80-5134

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO.

MARY GORMLEY,

Petitioner,

V.

DIRECTOR, CONNECTICUT STATE
DEPARTMENT OF ADULT PROBATION, and
THE ATTORNEY GENERAL OF THE
STATE OF CONNECTICUT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSEPH RUBIN
GRAHAM, MURPHY & RUBIN
487 MAIN STREET, SUITE 2
HARTFORD, CONNECTICUT 06103

ATTORNEY FOR PETITIONER

JULY 23, 1980

QUESTION PRESENTED

Whether Connecticut's telephone harassment statute, 53a Conn. Gen. Stat. § 183(3), which proscribes, "with intent to harass, annoy, or alarm, another person, ... mak[ing] a telephone call ... in a manner likely to cause annoyance or alarm," as construed without any First Amendment limitations by the Connecticut courts, is unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, which has not yet been published in the Federal Reporter, is published as Slip Op., p. 3109, of the Second Circuit. From the district court, the [Magistrate's] Recommended Ruling on Petition for Writ of Habeas Corpus, and the Ruling on Petitioner's Objection to Magistrate's Recommended Ruling have not been published. The opinion of the Appellate Session of the Connecticut Superior Court is reported sub. nom. State v. Anonymous, 34 Conn. Supp. 689, 389 A. 2d 1270(1978); cert. den. sub. nom. State v. Gormley, 174 Conn. 803, 382 A. 2d 1332(1978). All of these opinions are included in the Appendix.

JURISDICTION

The judgment of the Second Circuit of which review is sought was rendered and entered on May 27, 1980, and this Petition is filed within sixty days of that date, pursuant to Rule 20.1. This Court has jurisdiction to review that judgment by writ of certiorari pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS and STATUTES

First Amendment, United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment, Section One, United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

53a Conn. Gen. Stat. §183:

(a) A person is guilty of harassment when:

(1) By telephone, he addresses another in or uses indecent or obscene language; or

(2) with intent to harass, annoy or alarm another person he communicates with a person by telegraph, mail, or any other form of written communication, in a manner likely to cause annoyance or alarm; or

(3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause

annoyance or alarm.

(b) For purposes of this section, such offense may be deemed to have been committed either at the place where the telephone call was made, or at the place where it was received.

(c) The court may order any person convicted under this section to be examined by one or more psychiatrists.

(d) Harassment is a class C misdemeanor.

Illinois Rev. Stat. 1973, ch. 38; par. 26-1*:

(a) A person commits disorderly conduct when he knowingly:

(1) Does any act in such unreasonable manner as to alarm or disturb another and to provoke a breach of the peace; or

(2) With intent to annoy another, makes a telephone call, whether or not conversation thereby ensues; or

(3) Transmits in any manner to the fire department of any city, town, village or fire protection district a false alarm of fire, knowing at the time of such transmission that there is no reasonable ground for believing that such fire exists; or

(4) Transmits in any manner to another a false alarm to the effect that a bomb or other explosive of any nature is concealed in such place that its explosion would endanger human life, knowing at that time of such transmission that there is no reasonable

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* Subsection (a)(2) was deleted in 1977 by P.A. 80-795, which substituted Ill. Rev. Stat. 1977, ch. 38, par. 16.4-1 in its place.

ground for believing that such bomb or explosive is concealed in such place; or

(5) Transmits in any manner to any peace officer, public officer or public employee a report to the effect that an offense has been committed, knowing at the time of such transmission that there is no reasonable ground for believing that such an offense has been committed; or

(6) Enters upon the property of another and for a lewd or unlawful purpose deliberately looks into a dwelling on the property through any window or other opening in it; or

(7) While acting as a collection agency as defined in the "Collection Agency Act" or as an employee of such collection agency, and while attempting to collect an alleged debt, makes a telephone call to the alleged debtor which is designed to harass, annoy or intimidate the alleged debtor.

(b) Sentence.

A violation of subsection 26-1(a)(1) or (a)(2) is a Class C misdemeanor. A violation of subsection 26-1(a)(4) is a Class A misdemeanor. A violation of subsection 26-1(a)(5) or (a)(6) is a Class B misdemeanor. A violation of subsection 26-1(a)(3) is a Class 4 felony.

A violation of subsection 26-1(a)(7) is a Business Offense and shall be punished by a fine not to exceed $3,000.

Illinois Rev. Stat. 1977, ch. 38, par. 16-4.1:

Harassment by telephone is use of telephone communication for

any of the following purposes:

(1) Making any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent with an intent to offend; or

(2) Making a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number; or

(3) Making or causing the telephone of another repeatedly to ring, with intent to harass any person at the called number; or

(4) Making repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(5) Knowingly permitting any telephone under one's control to be used for any of the purposes mentioned herein.

Every telephone directory published for distribution to members of the general public shall contain a notice setting forth a summary of the provisions of this Section. Such notice shall be printed in type which is no smaller than any other type on the same page and shall be preceded by the word "WARNING". All telephone companies in this State shall cooperate with law enforcement agencies in using their facilities and personnel to detect and prevent violations of the Act.

New York Penal Law §240.30

§240.30 Aggravated harassment

A person is guilty of aggravated harassment when, with intent to harass, annoy, threaten or alarm another person, he:

(1) Communicates, or causes a communication to be initiated by mechanical or electronic means or otherwise, with a

person, anonymously, or otherwise, by telephone, or by telegraph, mail or any other form of written communication, in a manner likely to cause annoyance or alarm; or

(2) Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.

Aggravated harassment is a class A misdemeanor.

Oregon Revised Statutes 166.065:

(1) A person commits the crime of harassment if, with intent to harass, annoy or alarm another person, he:

(a) Subjects another to offensive physical contact; or

(b) Publicly insults another by abusive or obscene words or gestures in a manner likely to provoke a violent or disorderly response; or

(c) Communicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm; or

(d) Engages in a course of conduct that alarms or seriously annoys another person and which serves no legitimate purpose.

(2) Harassment is a Class B misdemeanor.

Wisconsin Statutes, §947.01*

Whoever does any of the following may be fined not more than $100 or imprisoned not more than 30 days:

(1) In a public or private place, engages in violent, abusive, indecent, profane, boisterous, unreasonably loud,

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* Subsection (2) has been repealed and replaced by §947.012 Wis. Stats.

or otherwise disorderly conduct under circumstances in which such conduct tends to cause or provoke a disturbance; or

(2) With intent to annoy another, makes a telephone call, whether or not conversation ensues.

STATEMENT of the CASE

This federal habeas corpus proceeding, pursuant to 28 U.S.C. §2254, sought review, on First Amendment grounds, of the state court conviction of the petitioner, Mrs. Mary Gormley, of telephone harassment. Mrs. Gormley was convicted, after a trial by jury in the Connecticut Court of Common Pleas, of harassment in violation of 53a Conn. Gen. Stat. §183(3)[1]. She appealed her conviction, on First Amendment grounds, to the Appellate Session of the Connecticut Superior Court. Although that appeal was the first place in which the First Amendment issue was raised, the Appellate Session reached the First Amendment claim, rejected it on the merits, and affirmed, State v. Anonymous (1978-4), 34 Conn. Supp. 689, 695-6, 389 A. 2d 1270, 1273-4(1978).[2] The Connecticut Supreme Court denied certification without opinion, State v. Gormley, 174 Conn. 803, 382 A. 2d 1332(1978). State remedies were thereby exhausted.

The basis of the harassment charge was one telephone call which Mrs. Gormley allegedly made to the complainant, while the complainant was at work at a restaurant. The complainant testified that Mrs. Gormley said

> that she had photographs to prove that my mother was in bed with her husband, that our family are a bunch of nuts and we are all under psychiatric care.

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1 "[A] person is guilty of harassment when: . . (3) with intent to harass, annoy, or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

2 In the same opinion, the Appellate Session reversed Mrs. Gormley's conviction for disorderly conduct on First Amendment grounds. That conviction had resulted from the same trial as the instant case, although it involved a different, but related, factual situation.

Appendix in United States Court of Appeals for the Second Circuit [hereinafter "App. 2nd Cir."] p. 14. There was also testimony that Mrs. Gormley, in the same call, had first stated this allegation to another waitress who had answered the telephone, App. 2nd Cir. 15, and there was testimony about another encounter, earlier in the day, at which Mrs. Gormley had allegedly insulted the complainant in person, State v. Anonymous, supra, 34 Conn. Supp. at 690-91, 389 A. 2nd at 127.

In his instructions, the trial judge explained the meaning of some of the operative words of the charging statute as follows:

> . . . [H]arass . . . mean[s] to trouble, worry, or torment another . . . [A]nnoyance [means] to irritate, or to vex; to bother, as by repeated actions . . . [To] alarm [means] to make suddenly afraid of or anxious; frightening.

App. 2nd Cir. 18. The trial judge specifically directed the jury to consider the content of Mrs. Gormley's alleged expression in reaching its verdict, when he said,

> So if you find in this case, that the defendant made a telephone call with that intention in mind to harass, to annoy, and in fact that the telephone call, in the conversation, harassed and annoyed another person, then under these circumstances you would find the defendant guilty of that offense.

App. 2nd Cir. 18 [emphasis added]. Later the judge reminded the jury that "you heard her testimony as to the language that was used in the course of that telephone call," App. 2nd Cir. 21 [emphasis added]. There was no instruction at all concerning First Amendment limitations on the punishment for or limitation of the content of speech or expression.

After exhausting her state remedies, Mrs. Gormley filed a habeas corpus petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Connecticut. The petition directly raised the First Amendment issue which is here presented to this Court, Record, United States Court of Appeals for the Second Circuit (hereinafter, "R."), Doc. No. 1, p. 4. No evidentiary hearing was requested or held in the District Court, and the record consisted primarily of portions of the transcript of the state court trial. The district Court denied the petition on the merits of the First Amendment claim, App., Docs. B and C. Mrs. Gormley noted an appeal to the Second Circuit, and the district judge issued a certificate of probable cause pursuant to 28 U.S.C. §2253. The Second Circuit, in a full opinion, App., Doc. A, affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN SUBSTANTIAL CONFLICT WITH RECENT DECISIONS OF STATE COURTS OF LAST RESORT.

Two state courts of last resort have recently invalidated telephone harassment statutes which are essentially identical to each other, and very similar to the Connecticut statute in question. In People v. Klick, 66 Ill. 2d 269, 362 N.E.2d 329(1977), the Illinois Supreme Court struck down Ill. Rev. Stat. 1973, ch. 38, par. 26-1(a)(2), which then provided[3] that

> (a) A person commits disorderly conduct when he knowingly:
> (2) With intent to annoy another, makes a telephone call, whether or not conversation thereby ensues.

In State v. Dronso, 90 Wis. 2d 149, 279 N.W. 2d 710(1979), the Wisconsin Supreme Court overturned §947.01(2) Wis. Stats., which then provided[4] that

> Whoever does any of the following may be fined . . . or imprisoned . . . :
> (2) With intent to annoy another, makes a telephone call, whether or not conversation ensues.

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3 Apparently in response to the decision in Klick, supra, the Illinois legislature, by P.A. 80-795, deleted the disputed section from the statute, replacing it with Ill. Rev. Stat. 1977, ch. 38, par. 16.4-1. Illinois' new statute, which proscribes "[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person at the called number," Ill. Rev. Stat 1977, ch. 134, par. 16.4-1(2), was upheld in People v. Parkins, 77 Ill. 2d 253, 396 N.E.2d 22(1979), app. dism'd for want of subst. fed'l quest., ___ U.S. ___, 27 Cr. L. Rptr. 4055 (April 21, 1980). The new statute, unlike Connecticut's, has elimated the sweeping word "annoy", and the Illinois court, acting in a limiting way which the Connecticut courts refused to do, explained that "The determination of the legislative intent in requiring proof of the intent "to abuse threaten or harass" rather than, as in the earlier statute, would appear, appropriately, to invoke the maxim noscitur a sociis. . . . Thus the words 'abuse' and 'harass' take color from the word 'threaten' and acquire more restricted meanings," 396 N.E. 2d at 24.

4 Apparently in response to the Dronso decision, supra, Section 947.01(2) Wis. Stats. has been repealed and replaced by §947.012 Wis. Stats.

Both the Illinois and Wisconsin courts held that their states' statutes were unconstitutionally overbroad under the First Amendment as applied to the states by the Fourteenth Amendment. Both courts focussed on the breadth of the word "annoy" in reaching their decision. Of course the word "annoy" is also a central (and unlimited) operative word in the definition of harassment under 53a Conn. Gen. Stat. §183. As the Klick court explained, in terms equally applicable to the Connecticut statute,

> Conceivably, this section could make criminal a single telephone call made by a consumer who wishes to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters. First Amendment protection is not limited to amiable commications.

362 N.E. 2d at 331-32.

Although counsel is unaware of any judicial decision invalidating or upholding a telephone harassment statute identical to Connecticut's, other courts have overturned substantially similar statutes on constitutional grounds. In State v. Blair, 287 Or. 519, 601 P.2d 766(1979), the Oregon Supreme Court considered a challenge to O.R.S. 166.065(1)(c), which provided that

> A person commits the crime of harassment if, with intent to harass, annoy, or alarm another person, he: (c) Communicates with a person, anonymously or otherwise, by telephone, mail or other form of written communication, in a manner likely to cause annoyance or alarm.

This Oregon statute is substantially identical to 53a Conn. Gen. Stat. §183(3). After examining it carefully the Oregon Supreme Court invalidated the statute on constitutional grounds, noting that it could proscribe communication from "angry parents, disappointed customers, jealous lovers, or followers of opposing athletic teams," 601 P.2d at 768.

By comparison, in People v. Smith, 89 Misc. 2d 789, 392 N.Y.S. 2d 968(1977), cert. den., 434 U.S. 920(1977), a New York appellate court upheld N.Y. Penal Law §240.30, which provides that

> A person is guilty of aggravated harassment when, with intent to harass, annoy, threaten or alarm another person, he: . . . 2. Makes a telephone call, whether or not a conversation ensues, with no purpose of legitimate communication.

Section 240.30, because it exempts any calls made with any purpose of legitimate communication, is much narrower than the Connecticut statute. Nonethless, the Smith court found that it could uphold the statute, in the face of a First Amendment challenge, only by construing it as limited to obscenity, unequivocal and specific threats, communications directed to an unwilling recipient under circumstances wherein substantial privacy interests are being invaded in an essentially intolerable manner, communications which by their very utterance tend to incite an immediate breach of the peace, and documents simulating court process, 392 N.Y.S. 2d at 971. It is just such a narrowing construction which the Connecticut courts refused to provide in the instant case.

II. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S FIRST AMENDMENT OVERBREADTH DOCTRINE.

Mrs. Gormley's conviction of harassment is invalid because 53a Conn. Gen. Stat. §183(3) as it was applied in her case and as it is written is unconstitutionally overbroad. The statute is susceptible of applications to speech protected by the Frist Amendment to the United States Constitution, which is applicable to the states through the Fourteenth Amendment.

This Court has consistently held that criminal statutes which punish the use of words or the content of expression must be precisely and narrowly drawn and may bring within their scope only those narrowly limited and precisely defined classes of expression

which are not protected by the First Amendment. Hess v. Indiana, 414 U.S. 105(1973); Gooding v. Wilson, 405 U.S. 518, 522(1972). One who challenges a criminal statute claiming it is overly broad under the First Amendment is not required to demonstrate that his own alleged conduct is protected by the First Amendment. To have a conviction under an overly broad statute declared invalid, he need only show that the statute is capable of application to protected speech. The First Amendment policy of encouraging robust public debate has resulted in the overbreadth doctrine because of "the transcendent value to all society of constitutionally protected expression" and the fear that without close attention to criminal statutes proscribing expression,

> Persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Lewis v. City of New Orleans, 415 U.S. 130, 133-34(1974).[5]

The kinds of expression which this Court has held that governments may criminally proscribe as being outside the protection of the First Amendment include obscenity, Roth v. United States, 354 U.S. 476 (1957), direct threats to immediate violence, Watts v. U.S. 394 U.S. 705 (1969); incitement to conduct which creates a clear and present danger of violence, Brandenburg v. Ohio, 395 U.S. 444 (1969); and "fighting words" or "words that have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." Gooding v. Wilson, 405 U.S. 518, 523 (1972).

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5 This Court in Broadrick v. Oklahoma,413 U.S. 601 (1973), indicated, in a §1983 case regarding state restrictions on political activities, that the application of the overbreadth doctrine on facial overbreadth grounds should be limited, in cases of conduct, to statutes which are substantially overbroad. (cont'd.)

The language of Connecticut's telephone harassment statute allows for a substantially overbroad application. The elements of §183(3) require proof of (1) intent to harass, annoy or alarm another; (2) the making of a phone call, whether or not conversation ensues, (3) in a manner likely to cause annoyance or alarm. Although the statute appears superficially neutral in that it does not specifically condemn language or speech, the phrase "in a manner likely to cause annoyance or alarm" renders it facially overboard. Many communications by telephone which are clearly protected by the First Amendment can be punished by this statute. Lobbyists for or against any political issue, be it nuclear power, abortion, disarmament, or Sunday closings, could be penalized for calling legislators in their offices during office hours in attempts to change legislators' opinions if they pressed their issue "in a manner likely to cause annoyance or alarm." A lobbyist may very specifically intend to alarm a public official with news communicated by telephone that his group has sufficient support to put that official's future in doubt through defeat at reelection or a recall referendum. The First Amendment would not countenance criminal sanctions for such communication merely because it was made via telephone. A long distance telephone call may be the speediest, most personal and most effective way for a voter in New Haven to communicate his or her complete disapproval of the proposed vote of his senator in Hartford on a new death penalty bill.

The right to petition one's government for redress of grievances does not evaporate when a business telephone is used in a

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5 (contd.) This case presents substantial overbreadth not only on the face of the statute, but even more clearly as it was applied to speech. This Court made clear in Lewis, supra, a later case, that the overbreadth doctrine fully applies in the context of criminal sanctions where the state courts have refused to narrowly construe an overbroad statute.

way which may be merely annoying. Conviction under a statute which forbabe three or more persons to assemble to conduct themselves "in a manner annoying to passersby" was invalidated in Coates v. Cincinnati, 402 U.S. 611 (1971), where this Court stated that the right of assembly could not be restricted, "simply because its exercise may be 'annoying' to some people." Id. at 615. As this Court held in Terminiello v. Chicago, 337 U.S. 1 (1949), reversing the disorderly conduct conviction of a speaker at a public meeting, who attacked "Communistic, Zionistic Jews,"

> [F]reedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above inconvenience, annoyance or unrest.

Id at 4. [Emphasis added].

The fact that the statute in question requires a specific intent "to harass, annoy, or alarm another person," 53a Conn. Gen. Stat. §183(3), does nothing to cure the overbreadth problem. If actually annoying or alarming legislators by telephone, for example, cannot be totally proscribed consistently with the First Amendment, it makes no difference whether the caller acts with an intent to annoy. Even if he does, his action is protected. While a specific intent requirement may sometimes help to save a statute from a constitutional vagueness challenge, it has no bearing at all on issues of overbreadth.

It may be argued that the statute does not explicitly proscribe speech, in that it punishes making a call, "whether or not conversation ensues." However, it cannot be argued in this case that the statute as applied was not used specifically to proscribe the content of expression. The trial judge instructed the jury to consider whether the "telephone call, in the conversation, har-

assed and annoyed another person." App. 2nd Cir. 18. Again, he reminded the jury that they had heard "testimony as to the language that was used in the course of that telephone call." App. 2nd Cir. 21.

Although the District Court suggested that the trial judge's instructions to consider the content of the telephone conversation were meant to suggest only that the content might be relevant to the issue of intent, such a conclusion cannot be supported when the actual instructions are examined. The entire paragraph which contains the central disputed instruction reads as follows:

> So the test again is what people of common intelligence and common sense would understand would be a telephone call made in a manner likely to cause or have a direct tendency to cause annoyance or alarm. So if you find in this case that the defendant made a telephone call with that intention in mind to harass, to annoy, and in fact that that telephone call, in the conversation, harassed and annoyed another person, then under those circumstances, you would find the defendant guilty of that offense. If you do not find those elements to have been proven beyond a reasonable doubt, then under those circumstances your verdict in connection with this particular charge would be one of not guilty as regards to harassment.

App. 2nd Cir. 18-19 [emphasis added]. In context, the instruction clearly orders the jury to consider the content of the conversation in determining whether or not the telephone call was made in "a manner likely to cause annoyance or alarm," 53a Conn. Gen. Stat. §183(3) and not in determining Mrs. Gormley's intent in making the alleged call. In fact, there is no suggestion at all that consideration of the content of the call should be limited to its bearing on the issue of intent, and the Connecticut Appellate Session never suggested that the instruction could be so construed, State v. Anonymous (1978-4), 34 Conn. Supp. 689, 389 A.2d 1270 (1978), App., Doc. D.

Where a statute sweeps within its scope expression which is punished for its content, then a conviction can be upheld only if that sweep is not susceptible of application to protected expression. In this case the only unprotected category of expression into which the alleged conduct even arguably fell was "fighting words." That phrase means "words that have a direct tendency to cuase acts of violence by the person to whom, individually, the remark is addressed." Gooding v. Wilson, supra, 405 U.S. at 523. Of course it is improbable that acts of violence were going to occur over the telephone. The jurors, at any rate, were not given the constitutional limitations on what expression could be punished by either the words of the statute or the instructions of the trial judge. Without these qualifying limits, they were left afloat in the broad wash of the word "annoy," without the tools to determine a constitutional conviction. The statute, which is substantially overbroad on its face, was made even broader by the explicit directions of the trial judge to consider language without the constitutional limitations.

There have been no reported Connecticut cases discussing or limiting the harassment statute other than the opinion in this case. The Appellate Session of the Superior Court refused the opportunity to construe or narrow the statute and upheld the trial judge's instructions. As stated in Robinson v. California, 370 U.S. 660, 666 (1962):

> The instruction of the trial court, implicitly approved on appeal, amounted to 'a ruling on a question of state law that is as binding on us as though the precise words had been written' into the statute. Terminiello v. Chicago, 337 U.S. 1, 4. "We can only take the statute as the state courts read it." Id. at 6.

This Court, therefore, has before it for possible review a state conviction under an overly broad statute expressly applied to speech.

Respectfully submitted,

JOSEPH RUBIN
ATTORNEY FOR PETITIONER
487 MAIN STREET, SUITE 2
HARTFORD, CONNECTICUT 06103
(203) 522-8631

DOCUMENT A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 913—September Term, 1979

(Argued March 18, 1980 Decided May 27, 1980)

Docket No. 79-2241

MARY GORMLEY,

Appellant,

v.

DIRECTOR, CONNECTICUT STATE DEPARTMENT OF PROBATION and ATTORNEY GENERAL OF THE STATE OF CONNECTICUT,

Appellees.

Before:

WATERMAN, MANSFIELD and TIMBERS,
Circuit Judges.

Appeal from a judgment entered in the District of Connecticut, M. Joseph Blumenfeld, *District Judge*, denying a petition for a writ of habeas corpus which challenged, as unconstitutionally overbroad on its face and as applied,

the Connecticut telephone harassment statute under which appellant was convicted.

Affirmed.

JOSEPH RUBIN, Hartford, Conn., *for appellant.*

ROBERT E. BEACH, JR., Asst. State's Atty., Wallingford, Conn., *for appellees.*

TIMBERS, *Circuit Judge*:

One of the symptoms of a sick segment of our society is the increasing frequency with which the telephone is used to harass and annoy others. Many states, as well as the federal government, have enacted statutes which make that conduct a criminal offense.

Such a statute—the Connecticut telephone harassment statute[1]—is before us on the instant appeal from a judgment entered in the District of Connecticut denying appellant Mary Gormley's petition for a writ of habeas corpus. The questions presented are whether that statute, under which appellant was convicted in the Connecticut state courts, is unconstitutionally overbroad on its face and as applied. We agree with the district court and the state courts that it is not. We affirm the judgment of the district court.

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1 The Connecticut telephone harassment statute, Conn. Gen. Stat. § 53a-183(a)(3) (Rev. 1958, Supp. 1979), in relevant part provides:

> "A person is guilty of harassment when . . . (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

I

The events which led tp appellant's conviction in the state courts occurred on the evening of September 1, 1974. They involve two separate but related incidents.

The first incident occurred about 6:30 P.M. The complainant[2] and a friend drove into the parking lot of Hardee's Restaurant in Newington, Connecticut, where complainant worked. Appellant, who had been following complainant, drove her car into the same parking lot and pulled up abreast of complainant's car. As complainant emerged from her car, appellant shouted from her car window that complainant was a "tramp", that complainant's mother was a whore and had gone to bed with appellant's husband, and that appellant was "going to get" complainant this time. While appellant was shouting these insulting remarks, complainant and her friend walked toward the restaurant and entered. This incident was the basis for the disorderly conduct charge for which appellant was prosecuted under Conn. Gen. Stat. § 53a-182(a)(2) (Rev. 1958, Supp. 1979).

The second incident occurred between 9:00 and 10:00 P.M. the same evening. Appellant telephoned Hardee's Restaurant where complainant was working. The manager who received the call passed the receiver to another

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2 Every good case of course should have an element of mystery. *Mallis v. FDIC*, 568 F.2d 824, 827 n.4 (2 Cir. 1977), *cert. dismissed sub nom. Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978); *Westchester Fire Insurance Company v. Tantalo*, 273 F. Supp. 7, 12 n.5 (D.Conn. 1967). The mystery here is why the complaining witness is referred to as "complainant" and not otherwise identified in the state court opinions, whereas appellant Gormley is referred to in the caption of the opinion by the Appellate Session of the Superior Court as "Anonymous" (*State v. Anonymous*, 34 Conn. Supp. 689, 389 A.2d 1270 (Super. Ct. 1977) (Shea, J.), *appeal denied*, 174 Conn. 803, 382 A.2d 1332 (1978)). Since the state courts have referred to the complaining witness throughout as "complainant", we shall do likewise.

employee who in turn passed the receiver to complainant. When complainant got to the phone she heard appellant repeat substantially the same insulting remarks she had made earlier in the evening in the parking lot. Appellant added, however, that she had photographs to prove that complainant's mother had been in bed with appellant's husband, that complainant's family were a bunch of nuts and were all under psychiatric care. This telephone call was the basis for the harassment charge for which appellant was prosecuted under Conn. Gen. Stat. § 53a-183(a)(3) (Rev. 1958, Supp. 1979).

Appellant was charged in a two count information and was convicted on March 18, 1976 on the disorderly conduct and harassment counts after a jury trial in the Court of Common Pleas at New Britain. She was sentenced on April 15, 1976 on each count to consecutive three month terms of imprisonment. Execution of the sentences of imprisonment was suspended and she was ordered to serve consecutive one year terms of probation under the supervision of the Department of Adult Probation.

Appellant appealed to the Appellate Session of the Superior Court. On September 9, 1977 her conviction on the disorderly conduct count was set aside and a new trial was ordered; but her conviction on the harassment count was affirmed. *State v. Anonymous*, *supra* note 2. On March 7, 1978 the Connecticut Supreme Court denied appellant's petition for certification.[3] *Id.*

Appellant thereupon filed a petition for a writ of habeas corpus in the District Court for the District of Connecti-

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3 On May 17, 1978 the Court of Common Pleas ordered that appellant commence serving her sentence of probation. Magistrate Eagan on June 16, 1978 entered a stay of this order which he later lifted on February 7, 1979. For aught that appears in the record before us, appellant has not yet commenced serving her sentence of probation. It is for this reason that we order that our mandate issue forthwith.

cut. In a well reasoned opinion dated October 19, 1979, Judge Blumenfeld denied appellant's habeas petition; in so doing, he accepted Magistrate Eagan's findings of fact as modified and accepted the magistrate's recommendation that the petition be denied.

From the judgment entered on Judge Blumenfeld's opinion, this appeal has been taken.

II

In the light of these facts and prior proceedings, we turn directly to the chief issue on this appeal, namely, whether the Connecticut telephone harassment statute under which appellant was convicted is unconstitutionally overbroad on its face. We hold that it is not.

Congress has enacted the federal telephone harassment statute,[4] 47 U.S.C. § 223 (1976), the relevant provisions of which closely parallel the Connecticut statute here in-

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[4] The federal telephone harassment statute, 47 U.S.C. § 223(1) (1976), in relevant part provides:

"Whoever—

(1) in the District of Columbia or in interstate or foreign communication by means of telephone—

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) *makes a telephone call, whether or not conversation ensues*, without disclosing his identity and *with intent to annoy, abuse, threaten, or harass any person at the called* number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number;

. . .

shall be [punished]." (Emphasis added to indicate language parallel to that in Connecticut telephone harassment statute.)

volved. The Third Circuit in *United States v. Lampley*, 573 F.2d 783 (3 Cir. 1978), rejected First Amendment attacks upon the constitutionality of the federal telephone harassment statute on its face. The *Lampley* court emphasized that

> "[I]n enacting § 223 the Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives." *Id.* at 787 (citations omitted).

The parallel between the "compelling interest" which Congress sought to protect in enacting the federal statute and the equally compelling interest which the Connecticut legislature sought to protect in enacting the statute here in question was succinctly stated by Judge Blumenfeld in his opinion below:

> "Connecticut's interest is equally compelling and is unrelated to the suppression of free expression, as evidenced by the statute's neutral approach to ensuing conversation or its absence. And like the federal law, Connecticut's specific intent requirement 'precludes the proscription of mere communication.' [*Id.* at 787]"

Clearly the Connecticut statute regulates *conduct*, not mere speech. What is proscribed is the making of a telephone call, with the requisite intent and in the specified manner. As the Appellate Session of the Superior Court stated in *State v. Anonymous*, *supra*, 34 Conn. Supp. at 696, 389 A.2d at 1273, "[A] recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily

as the most scurrilous epithet." Indeed, by its express terms the statute may be violated where no conversation at all occurs.

In considering appellant's claim that the Connecticut statute is overbroad on its face and sweeps within its purview communication which is protected by the First Amendment, we must be guided by the standard enunciated by the Supreme Court in *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973):

> "[W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."

The asserted breadth of the Connecticut statute is circumscribed by the elements of the offense it proscribes. To run afoul of the statute, a telephone call must be made not merely to communicate, but "with intent to harass, annoy or alarm" and "in a manner likely to cause annoyance or alarm." Whether speech actually occurs is irrelevant, since the statute proscribes conduct, whether or not a conversation actually ensues. *United States v. Lampley*, *supra*, 573 F.2d at 787.

Harassing telephone calls are an unwarranted invasion of privacy. They appear to be on the increase. They are properly outlawed by federal and state statutes. The possible chilling effect on free speech of the Connecticut statute strikes us as minor compared with the all-too-prevalent and widespread misuse of the telephone to hurt others. The risk that the statute will chill people from, or prosecute them for, the exercise of free speech is remote. The evil against which the statute is directed is both real and ugly.

We hold that the Connecticut telephone harassment statute is not unconstitutionally overbroad on its face.[5]

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5 The Connecticut statute is readily distinguishable from the telephone harassment statutes which were held unconstitutionally overbroad in cases relied on by appellant such as *Walker v. Dillard*, 523 F.2d 3 (4 Cir.), *cert. denied*, 423 U.S. 906 (1975), and *Radford v. Webb*, 446 F.Supp. 608 (W.D.N.C. 1978), *aff'd per curiam*, 596 F.2d 1205 (4 Cir. 1979). In both cases the statutes punished speech alone. The statute involved in *Walker* made it unlawful for any person to "curse or abuse anyone, or use vulgar, profane, threatening or indecent language" over the telephone. *Walker v. Dillard*, *supra*, 523 F.2d at 4 n.1. In *Radford* the statute outlawed the use in telephone communications of "any words or language of a profane, vulgar, lewd, lascivious or indecent character, nature or connotation", *Radford v. Webb*, *supra*, 446 F.Supp. at 610, and hence "would reach comments made in the course of heated argument or expressions of justified indignation just as easily as . . . the traditional obscene phone call." *Id.* at 610-11.

We are mindful that the courts of several states have struck down telephone harassment statutes as unconstitutionally overbroad. *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975); *People v. Klick*, 66 Ill.2d 269, 362 N.E.2d 329 (1977); *State v. Dronso*, 90 Wis.2d 149, 279 N.W.2d 710 (1979). Accordingly, we have been invited likewise to hold unconstitutional the Connecticut statute or, at least, to caution the Connecticut courts in the future to construe the statute narrowly so as to eliminate any overbreadth. We decline the invitation.

We note that our concurring colleague would not decline the invitation to caution the Connecticut courts to construe the statute narrowly so as to eliminate any overbreadth. Accordingly, we suggest that Judge Mansfield's concurring opinion should be read in the light of the following observations.

First, it is not the proper function of the federal courts independently to construe a state statute so as to eliminate its overbreadth, if any, for that can be done only by the state. *Gooding v. Wilson*, 405 U.S. 518, 520 (1972). What the Supreme Court has cautioned us should not be done directly surely should not be done by implication, as our concurring colleague would do by way of dictum.

Second, since in our view the Connecticut statute is not overbroad, "whatever overbreadth may [be said to] exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." *Broadrick v. Oklahoma*, *supra*, 413 U.S. at 615-16.

Third, having in mind that the Supreme Court has never struck down, or sanctioned the striking down of, a state telephone harassment statute, we should bear in mind that the Court in *Broadrick* could hardly

III

Appellant also claims that the Connecticut statute is unconstitutionally overbroad as applied to her. We disagree.

Her claim in this respect is based on the state trial court's charge which focused the jurors' attention on the content of the telephone call. Our careful examination of the charge as a whole satisfies us that the trial court's instruction that the jury was entitled to consider "the language that was used in the course of the telephone call" was for the purpose of enabling the jury to determine whether the state had proven the essential element of *intent* as required by the statute. As the Third Circuit stated in *United States v. Lampley*, *supra*, 573 F.2d at 787, "Whether or not the actual conversation contains harassing language may be relevant to the question of intent."

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have admonished more emphatically against facial overbreadth adjudication of a state statute by the federal courts:

> "[F]acial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from 'pure speech' toward conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe." 413 U.S. at 615 (citation omitted).

Fourth, the references throughout the concurring opinion to "speechless calls" (e.g. "repeated speechless calls of the type presented here") appear to be misdirected. This case does not involve speechless calls.

In short, having carefully considered Judge Mansfield's concurring opinion, we adhere to our majority opinion in all respects.

In the instant case, we believe that the trial court's instruction to the jury to consider the language used by appellant in the course of the telephone call not only was permissible; it was indispensable to a proper determination of whether the statutory requirement of "intent to harass" had been proven.

We hold that the Connecticut telephone harassment statute is not unconstitutionally overbroad as applied to appellant.

Appellant was convicted on the basis of overwhelming evidence of a serious crime committed more than five years ago—violation of the Connecticut telephone harassment statute. Her attack upon the constitutionality of that statute has been carefully considered and uniformly rejected by the Connecticut state courts, by a federal magistrate, by a federal district judge and by this Court. We order that the mandate issue forthwith.

Affirmed.

MANSFIELD, *Circuit Judge* (Concurring):

I concur on the limited ground that the Connecticut telephone harassment statute, Conn. Gen. Stat. Ann. § 53a-183(a)(3) (Rev. 1958, Supp. 1979), if narrowly construed by the Connecticut Supreme Court to apply only to speechless calls or to obscene or threatening calls of the type involved in this case, may be upheld if so construed. Unfortunately, since appellant took no exception to the trial judge's charge to the jury, the judge was never af-

forded the opportunity to so construe the statute and instruct the jury in terms of the narrower construction. However, I believe the Connecticut Supreme Court should be afforded the opportunity to construe the statute so that it will not penalize the exercise of First Amendment free speech rights.[1] If it were not so construed, the statute would clearly be void for overbreadth.

No person enjoys being the victim of repeated speechless calls of the type presented here. The state has a legitimate interest in protecting persons against such unwarranted invasion of privacy by others. See *Miller v. California*, 413 U.S. 15 (1973); *Rowan v. Post Office Department*, 397 U.S. 728 (1970). On the other hand, the First Amendment right of a person to communicate with another by telephone, even if the call may be considered "harassing" by the recipient, must also be respected.

Telephone calls by irate citizens to their Congressmen, by collectors seeking payment of legitimate bills overdue, by customers voicing to a seller dissatisfaction with goods or services purchased, and calls of like tenor, are likely to be annoying, even harassing, to the recipients. Such calls are usually made to influence the person called. No one could seriously question the caller's free speech right under the First Amendment to engage in such telephone conversations. Yet, by prohibiting telephone calls made "with intent to annoy" and "in a manner likely to cause annoyance," the Connecticut statute could be construed as

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1 The Connecticut Supreme Court denied certification without opinion, *State v. Gormley*, 174 Conn. 803, 382 A.2d 1332 (1978). This denial reflects nothing on the Connecticut Supreme Court's opinion of the merits of this case. "[A] denial of certification does not necessarily indicate our approval either of the result reached by the Appellate Division or of the opinion rendered by it." *State v. Chisholm*, 155 Conn. 706, 707, 236 A.2d 465, 466 (1968). Accord, *State v. Doscher*, 172 Conn. 592, 376 A.2d 359 (1977).

prohibiting the exercise of this free speech. Thus, the fact that the statute also prohibits the mere making of telephone calls where no speech follows hardly saves it from unconstitutional overbreadth. It is no comfort to the citizen telephoning his Congressman or to the defrauded consumer calling the swindler to know that the statute was not intended to apply to their telephone calls if its language plainly does so. The mere existence of a statute prohibiting such obviously lawful exercise of a free speech right has a chilling effect, particularly if enforcement is threatened by the recipient of a call.

Labelling the statute as one prohibiting "conduct" does not resolve this constructional dilemma. In most cases the "conduct" punished is the oral communication rather than the ringing of the telephone bell. The statute is not limited to the mere making of speechless telephone calls; were that the case, its constitutionality would be upheld. See, *Cox v. Louisiana*, 379 U.S. 536, 555 (1964). Cf., *Palma v. Powers*, 295 F. Supp. 924, 941 (D.C. Ill. 1969) (telephone service is not speech protected by the First Amendment). Indeed a statute prohibiting obscene, threatening, or speechless calls, made with intent to harass, would probably pass constitutional muster. But if the statute here were construed, as it easily could be, to prohibit any telephone call made "with intent to annoy," which had such effect, it would patently violate the First Amendment. The overbreadth would not only be real, but substantial. *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

Nor do any of the authorities relied upon by the majority support the view that such a potentially overbroad statute is constitutional on its face; on the contrary, most of the decided cases are to the contrary. Although the Third Circuit, in *United States v. Lampley*, 573 F.2d 783 (3d Cir. 1978), upheld the federal telephone harassment

statute, 47 U.S.C. § 223, it did so against a claim of *vagueness*, not overbreadth. Nothing in the decision supports the majority's citation of it as rejecting an overbreadth challenge, as is made here. In contrast, several courts have struck down similar telephone harassment statutes as overbroad. See, e.g., *People v. Klick*, 66 Ill.2d 269, 362 N.E.2d 329 (1977) (Illinois statute providing that "A person commits disorderly conduct when he knowingly: . . . (2) with intent to annoy another, makes a telephone call, whether or not a conversation thereby ensues."); *State v. Dronso*, 90 Wis.2d 149, 279 N.W.2d 710 (1979) (Wisconsin statute providing that one is guilty of disorderly conduct if "[w]ith intent to annoy another, [he] makes a telephone call, whether or not a conversation ensues."). See also, *Bolles v. People*, 189 Colo. 394, 541 P.2d 80 (1975) (Colorado statute providing that one commits harassment if, "with intent to harass, annoy or alarm another person, he: . . . communicates anonymously or otherwise, by telephone, telegraph, mail or any other form of communication in a manner likely to harass or cause alarm.").

The state may not abridge one's First Amendment freedoms merely to avoid annoyances. *Coates v. Cincinnati*, 402 U.S. 611 (1971).

> "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner." *Cohen v. California*, 403 U.S. 15, 21 (1971).

Moreover, the First Amendment protects more than just amiable communications. See, *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973); *Gooding v. Wilson*, 405 U.S.

518 (1972); *Terminiello v. City of Chicago*, 337 U.S. 1 (1948); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). A telephone harassment statute should be carefully tailored to avoid constitutional vulnerability on the ground that it needlessly penalizes free speech.

Applying these principles here, I am forced to conclude that, depending on how it is construed by the Connecticut Supreme Court, Conn. Gen. Stat. § 53a-183(a)(3) (Rev. 1958, Supp. 1979), might be constitutionally vulnerable for overbreadth. Since we are precluded from construing this state statute, *Gooding v. Wilson*, 405 U.S. at 520, and a narrow construction by the Connecticut Supreme Court would lead to the statute's being upheld as applied to the facts of this case, I concur in the result reached by the majority. Should the Connecticut Supreme Court, however, interpret the statute broadly to encompass constitutionally protected free speech, as distinguished from obscene, threatening or speechless telephone calls made with intent to harass the recipient, I would then feel compelled to declare the statute unconstitutional on its face.

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MARY GORMLEY :

VS. : CIVIL NO. H-78-264

DIRECTOR, CONNECTICUT STATE DEPARTMENT OF ADULT PROBATION, and THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT :

RECOMMENDED RULING ON PETITION FOR WRIT OF HABEAS CORPUS

The petitioner, Mary Gormley, applied to this court for a writ of habeas corpus pursuant to 28 U.S.C. §2254 (1966), releasing her from the custody of the Connecticut Department of Adult Probation. She claims that CONN. GEN. STAT. ANN. §53a-183(a)(3)[1] is unconstitutional on its face, and as applied, because it punishes protected speech. The petitioner has also moved for enlargement from the custody of the respondent state of Connecticut. After hearing and by agreement, commencement of the state sentence of probation was stayed pending decision on the petition for habeas corpus.

The petitioner was found guilty by a state jury of harassment in violation of both CONN. GEN. STAT. ANN. §§ 53a-182(a)(2) and 53a-183(a)(3). Her appeal assigning error in the denial of her motion to set aside the verdict resulted in the decision of the Appellate session that the disorderly conduct conviction under §53a-182(a)(2) violated fundamental first amendment rights. State v. Anonymous, 389 A.2d 1270, 34 Conn. Supp. 689 (1978-4).[2] The state appellate court however, found that the prohibition against 'harassing, annoying, or alarming' telephone calls in §53a-183(a)(3) withstood

constitutional attack and petitioner's conviction was upheld. State v. Anonymous, supra, at 1273. Both parties filed for certiorari to the Supreme Court of the state of Connecticut and certiorari was denied without opinion on March 7, 1978. The state has agreed that state remedies have been exhausted and thus no question as to federal jurisdiction appears.

The petitioner has alerted this court to the absence of a formal answer by the state. The effect of such a failure to deny, it is claimed, is the admission of petitioner's averments. Fed. R. Civ. P. 8(d). In this case, the interest of providing requisite notice of the respondent's arguments to the petitioner was diluted: the respondent's arguments were aired in a hearing on June 15, 1978 concerning the petitioner's Motion for Enlargement. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48 (1957); United States v. Hougham, 364 U.S. 310, 317 (1960). "[T]he habeas court must itself insure that the relevant facts were found and that the correct legal standard was applied to them." United States ex rel. Williams v. LaVallee, 487 F.2d 1006, 1010 (2d Cir. 1973), cert. denied, 416 U.S. 916 (1974); Fed. R. Civ. P. 8(f): "All pleadings shall be so construed as to do substantial justice."; Conley v. Gibson, supra, at 47, 48; Fed. R. Civ. P. 1. Importantly, the petitioner received notice through respondent's brief and availed herself of the opportunity to reply to that brief. Fed. R. Civ. P. 8(e)(1): "No technical forms of pleadings or motions are required."

Both the presumption created by 28 U.S.C. §2254(d) (1966)

and the interests of comity require that a federal court accord great weight to state court's findings of fact in a habeas corpus action. LaValle v. Delle Rose, 410 U.S. 690, 694-95 (1973); Townsend v. Sain, 372 U.S. 293 (1963).

Thus, we accept the findings of fact of the state court, which were summarized by the appellate session as follows:

> On the same evening the defendant telephoned the complainant at the restaurant where she was working. After the complainant was called to the phone, she heard the defendant repeat substantially the same insults as those which had been made earlier in the parking lot of the restaurant.

Those insults were

> that the complainant was a "tramp", that her mother was a whore and had gone to bed with the defendant's husband, and that the defendant was "going to get" the complainant this time. State v. Anonymous, 389 A.2d 1270, 1271 (1978-4).

The trial judge's charge to the jurors provided them with definitions of "harass", "annoy" and "alarm" and instructed them that if they found the defendant-petitioner had made a telephone call with the intent to harass, annoy or alarm another person and the call did so, then the defendant-petitioner would be guilty of the offense. State v. Anonymous, supra, at 1273. These were the articulated constitutional standards applied by the trial court fact-finder.

As stated in Walker v. Dillard, 523 F.2d 3 (4th Cir. 1975), a case also brought on a habeas petition challenging the constitutionality of a state 'telephone abuse' statute on first amendment grounds: "We start from the proposition that the state has a legitimate interest in prohibiting obscene, threatening, and harassing phone calls, none of which are generally thought of as protected by the First Amendment." 523 F.2d at 4. State v. Jaeger, 249 N.W.2d 688 (Iowa, 1977); State v. Hagan, 588 P.2d 750 (Ariz. App. 1976); People v. Smith,

392 N.Y.S.2d 968 (1977); but see, People v. Klick, 362 N.E.2d 329 (Ill. 1977). At the same time we must allow the 'breathing space' essential to the survival of first amendment freedoms. Gooding v. Wilson, 405 U.S. 518, 522 (1972); Watts v. United States, 394 U.S. 705 (1969); Cohen v. California, 403 U.S. 15 (1971). For that reason criminal statutes will be even more strictly scrutinized for first amendment defects than civil statutes. F.C.C. v. Pacifica Foundation, — U.S.—, 98 S.Ct. 3026, 3041 (1978); Watts v. United States, supra.

This court lacks the 'authority to authoritatively construe state legislation' so as to mollify serious first amendment deficiencies in a statute which has not otherwise been effectively narrowed by a state court. Gooding v. Wilson, supra, at 520; United States v. Thirty-Seven (37) Photographs, 402 U.S. 363, 369 (1971); Walker v. Dillard, supra.

We find that CONN. GEN. STAT. ANN. §53a-183(a) was both carefully drawn and construed so as not to be susceptible of application to protected speech. The statute specifically applies only to the individual who 'makes a telephone call with intent to harass, annoy or alarm', in a manner annoying or alarming to a reasonable person. No facial overbreadth, or overbreadth as applied to the facts here, can be found where the legislature successfully proscribes the making of telephone calls, "whether or not a conversation ensues". §53a-183(a)(3) (emphasis added).

The appellate court in State v. Anonymous, supra, infringes upon no protected interest by construing the statute as a legitimate protection of the privacy rights of unreceptive listeners. Citing, Rowan v. Post Office Department, 397 U.S. 728 (1970); Lehman v. Shaker Heights, 418 U.S. 298 (1974). Appropriate alternative means of communication which will not

infringe upon the privacy rights of a captive audience remain untrammeled by the statute.

A federal district court in Walker v. Dillard, supra, did invalidate a statute which at first glance appears similar to the Connecticut statute at issue here.[3/] The Virginia statute is devoid of Connecticut's explicit prohibition against making a telephone call "in a manner likely to cause annoyance or alarm". §53a-183(a)(3) (emphasis added). Thus, no protection is offered to the indiscreet recipient of an abusive call. Furthermore, Virginia's statute does not either require intent or limit application to telephone calls 'whether or not a conversation ensues'.[4/]

The petitioner's application for a writ of habeas corpus is denied, as is the motion for enlargement. The June 15, 1978 Order staying the state suspended sentence is lifted.

Dated at Hartford, Connecticut, this 15 day of February, 1979.

F. Owen Eagan
United States Magistrate

FOOTNOTES

1/ CONN. GEN. STAT. ANN. §53a-183(a)(3) reads as follows:

> "A person is guilty of harassment when: ... (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm."

2/ Thus entitled, in view of CONN. GEN. STAT. ANN. §54-90.

3/ VA. CODE ANN. §18/1-238 states:

> "If any person shall curse or abuse anyone, or use vulgar, profane, threatening or indecent language over any telephone in this State, he shall be guilty of a misdemeanor...".

4/ The language of Connecticut's statute much more closely resembles that of a statute passed by the United States Congress, 47 U.S.C. §223(1)(B) (1968) which has not been challenged in court on first amendment grounds. Under that statute a person is guilty of making harassing telephone calls if he

> "makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number."

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U.S. DISTRICT COURT
DISTRICT OF CONN.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

MARY GORMLEY :

v. : CIVIL NO. H-78-264

DIRECTOR, CONNECTICUT STATE DEPARTMENT OF ADULT PROBATION, and THE ATTORNEY GENERAL OF THE STATE OF CONNECTICUT :

RULING ON PETITIONER'S OBJECTION TO MAGISTRATE'S RECOMMENDED RULING

The petitioner, Mary Gormley, challenges the Recommended Ruling of the Magistrate denying her application for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254 (1976). She was convicted on April 15, 1976, of harassment, a Class C misdemeanor under Conn. Gen. Stat. § 53a-183(a)(3), in a jury trial in the New Britain Court of Common Pleas.[1/] State remedies have been exhausted.

The facts, as the jury might have found them, are summarized in the opinion of the Appellate Session. State v. Anonymous (1978-4), 34 Conn. Supp. 689, 389 A.2d 1270 (1977). The specific incident that led to the harassment charge was petitioner's telephone call to the complainant on the evening

1/ Petitioner's conviction for disorderly conduct stemming from a related incident was reversed by the Appellate Session, Superior Court of Hartford County. State v. Anonymous (1978-4), 34 Conn. Supp. 689, 389 A.2d 1270 (1977). The harassment conviction was affirmed. A petition for certification to the Supreme Court of Connecticut was denied without opinion on March 7, 1978.

of September 1, 1974, following an altercation earlier that day in the parking lot of the restaurant where the complainant worked.[2/] The complainant testified that when she was called to the telephone, she heard petitioner say "that she [petitioner] had photographs to prove that my mother was in bed with her husband, that our family are a bunch of nuts and we are all under psychiatric care" (Tr. at 32).

Conn. Gen. Stat. § 53a-183(a)(3) provides that, "A person is guilty of harassment when . . . with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." (Emphasis added). Petitioner claims that the statute is overbroad, both facially and as applied, in violation of the first amendment. Specifically, the Magistrate's Recommended Ruling denying habeas relief is attacked on two grounds: first, that the Ruling erred in holding that the statute is not directed at the content of expression; and, second, that the Ruling improperly rested a conclusion of law on "facts" not present in the record. For the reasons stated below, I accept the Magistrate's recommendation that the petition be denied.

2/ There was evidence that petitioner followed the complainant to work and, in the parking lot, "drove up close to the complainant, who had by then emerged from her car, . . . and shouted from the car window that the complainant was a 'tramp,' that her mother was a whore and had gone to bed with the defendant's husband, and that the defendant was 'going to get' the complainant this time." State v. Anonymous, supra, at 690, 389 A.2d at 1271.

I. OVERBREADTH

Connecticut's telephone harassment statute punishes conduct, the making of a telephone call, when coupled with a specific anti-social intent. Conversation, or the lack of it, is not an element of the offense. That a conviction may be had, as in petitioner's case, when words are spoken does not necessarily render the statute invalid. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

Facial overbreadth in a statute regulating conduct, rather than pure speech, "must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate reach." Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). The telephone abuse statutes struck down in Walker v. Dillard, 523 F.2d 3 (4th Cir.), cert. denied, 423 U.S. 906 (1975), and Radford v. Webb, 446 F. Supp. 608 (W.D.N.C. 1978), aff'd per curiam, 596 F.2d 1205 (4th Cir. 1979), cases relied on by the petitioner, were overbroad because they punished speech alone and "would reach comments made in the course of heated argument or expressions of justified indignation just as easily as . . . the traditional obscene phone call." Id. at 610-11; see Walker v. Dillard, supra, at 5.

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In United States v. Lampley, 573 F.2d 783 (3d Cir. 1978), however, the court rejected a first amendment attack on the federal telephone abuse statute, 47 U.S.C. § 223(1)(B), (D) (1976), the wording of which parallels quite closely the Connecticut provision challenged by petitioner.[3/] Refusing to narrowly construe § 223(1)(D) so as to require the use of "harassing language," the Lampley court emphasized that "Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives." 573 F.2d at 787. Connecticut's interest is equally compelling and is unrelated to the suppression of free expression, as evidenced by the statute's neutral approach to ensuing conversation or its

---

3/ 47 U.S.C. § 223 provides in relevant part:

> "Whoever--
>
> (1) in the District of Columbia or in interstate or foreign communication by means of telephone--
>
> . . .
>
> (B) makes a telephone call, whether or not a conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;
>
> . . .
>
> (D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number;
>
> . . .
>
> shall be fined not more than $500 or imprisoned not more than six months, or both."

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absence. And like the federal law, Connecticut's specific intent requirement "precludes the proscription of mere communication." Id.

Petitioner argues that the trial judge's charge to the jury focused the jurors' attention on the "content of expression," rendering the statute overbroad as applied. This claim is without merit. "Whether or not the actual conversation contains harassing language may be relevant to the question of intent," id., and the jury were entitled to consider "the language that was used in the course of the telephone call" (Tr. at 384) for that purpose. The judge's instructions to this effect (Tr. 381, 396) were neither erroneous nor misleading.

II. DISPUTED FINDINGS OF FACT

Petitioner attacks the Magistrate's Recommended Ruling for accepting as a fact the state court's finding that, "After the complainant was called to the phone, she heard the defendant repeat substantially the same insults as those which had been made earlier in the parking lot of the restaurant." Magistrate's Recommended Ruling at 3, quoting State v. Anonymous, supra, at 691, 389 A.2d at 1271. Those insults are summarized in footnote 2 supra.

Perhaps the appellate court and the Magistrate were not as precise as they might have been in sorting out for the reader which set of petitioner's insults occurred during which of the two incidents on the day in question. The only

relevant question, however, is what the jurors were told by the trial judge, and a review of his instructions indicates that the judge was careful to distinguish the two incidents, the "conversations" that occurred during each one, the different offenses attributable to each incident with which petitioner was charged, and the purpose for which petitioner's statements were to be used in considering those charges. At no time did the judge suggest that the jury might consider the petitioner's statements in the parking lot as being relevant to the harassment charge. In any event, occurring as it did so close in time to the telephone call, the parking lot incident would be relevant to petitioner's intent at the time the call was made.

Accordingly, I accept the Magistrate's findings of fact regarding the events leading up to petitioner's conviction as modified by Part II of this ruling, and accept his recommendation that the application for a writ of habeas corpus be denied, and it is

SO ORDERED.

Dated at Hartford, Connecticut, this 19 day of October, 1979.

M. Joseph Blumenfeld
United States District Judge

12

The award for a portion of the psychiatric fees was not in error in view of the previous court order that a psychiatric examination be made. See *Stoner* v. *Stoner*, 163 Conn. 345, 357, 307 A.2d 146.

The award of counsel fees is attacked by the defendant, not on the grounds of the reasonableness of the amount ordered or the propriety of paying a legal clinic operated by a law school, but on the narrow grounds that the plaintiff received free legal services and that the court did not, in any case, adequately consider the defendant's ability to pay. The defendant points to no finding of fact or offer of proof that the plaintiff did not pay for legal services, nor does the record support the claim that the court did not consider the needs of the plaintiff and the ability of the defendant. The finding adequately supports the court's award.

As to the merits of the custody order, the finding of facts abundantly supports the conclusions reached by the court that the circumstances had changed sufficiently since the dissolution and the previous custody order to warrant issuance of a new order granting the plaintiff custody of the three children.

There is no error in the first appeal.

The second appeal is dismissed.

There is no error in the third appeal.

CONNECTICUT SUPPLEMENT

34 *Conn. Sup.* 689

STATE OF CONNECTICUT *v.* ANONYMOUS (1978–4)*

APPELLATE SESSION OF THE SUPERIOR COURT

Convicted of the statutory (§ 53a-182 [a] [2]) offense of disorderly conduct and of the further statutory (§ 53a-183 [a] [3]) offense of harassment, the defendant appealed claiming error in the charge to the jury and in a ruling on evidence. *Held:*

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1. Because the trial court's failure to instruct the jury that the defendant could be convicted under § 53a-182 (a) (2) only if she had uttered "fighting words," that is, language having a substantial tendency to provoke violent retaliation, deprived her of her fundamental right to free speech, a new trial had to be ordered on that charge.
2. Since § 53a-183 (a) (3), in proscribing telephone calls likely to cause annoyance or alarm, regulates not the content but the manner and means of communication, it was not necessary for the trial court to limit the application of that statute to "fighting words."
3. The trial court properly exercised its discretion in striking the defendant's testimony to the effect that she had been acquitted of a criminal charge brought against her previously by the same complainant, it was the defendant who first refe that other offense and there was no reference to its na to the facts relating to it.

Information charging the defendant with orderly conduct and harassment, brought to Court of Common Pleas and tried to the jury; dict and judgment of guilty and appeal by defendant. *Error in part; new trial.*

DAVID M. SHEA, J. The defendant was fo guilty by a jury of disorderly conduct in viola of General Statutes § 53a-182 (a) (2) and harrassment in violation of General Stat § 53a-183 (a) (3). She has appealed assig error in the denial of her motion to set aside verdict. In this appeal she claims that the cha to the jury was deficient in that it failed to circ scribe the language of the two statutes invol within the limits required by the first amendm prohibition against restrictions upon freedom speech, and she also claims error in a ruling evidence.

From the statements of facts in the b appears that the jury could have found day of the alleged offenses the complaining wit and her friend were traveling to work when t passed the defendant in another car. When the in which the complainant was riding turned into

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parking lot of the restaurant where she work the defendant's car, which had been following, dro up close to the complainant, who had by th emerged from her car, and the defendant shout from the car window that the complainant was "tramp," that her mother was a whore and h gone to bed with the defendant's husband, and th the defendant was "going to get" the complaina this time. While the defendant was making thes insulting remarks, the complainant and her com panion walked toward the restaurant and entere This incident was the basis for the disorderly con duct charge.

On the same evening the defendant telephoned th complainant at the restaurant where she was work ing. After the complainant was called to the phon she heard the defendant repeat substantially th same insults as those which had been made earlie in the parking lot of the restaurant. The harass ment charge was based upon this telephone call.

I

The defendant claims that her conviction under General Statutes § 53a-182 (a) (2) was a violation of her constitutional right of free speech because

* Thus entitled, in view of General Statutes § 54-90.

of the overbroad language of the statute, which the trial court failed to confine within constitutional limits. The pertinent portion of the statute provides: "A person is guilty of disorderly conduct when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he . . . (2) by offensive or disorderly conduct, annoys or interferes with another person . . . ." The charge gave the jury the statutory definitions of "intentionally" and "recklessly."[1] "Offensive con-

duct" was described as "conduct which under contemporary community standards is so grossly offensive to a person who actually overhears it or sees it as to amount to a nuisance." "Disorderly conduct" was explained as meaning "such conduct as outrages the sense of public decency" and also conduct which "must annoy or interfere with another person." Standard dictionary definitions of "annoy" and "interfere" were also given. In summation, the court stated that "the test, then, of this statute is what people of common intelligence and common sense would understand would be annoyance or interference with another person, which intentionally causes or has an intention to cause inconvenience, annoyance, or alarm, or which recklessly creates a risk of causing inconvenience, annoyance, or alarm to another person." In accordance with an exception taken by the defendant at the conclusion of the charge, the jurors were again instructed that there had to be a "specific intent of causing inconvenience, annoyance, or alarm and not just a general bad intent to do something wrong to somebody."

Although she filed no such request to charge and took no such exception to the charge before the trial court, the defendant now claims error in the failure to instruct the jurors that they could not convict her unless they found that she had uttered "fighting words" to the victim, as that term is used in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572. In *State* v. *Evans*, 165 Conn. 61, 70, it was held that a claim raised for the first time on appeal would be con-

[1] General Statutes § 53a-3 provides, in pertinent part, that "(11) a person acts 'intentionally' with respect to a result or to conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct; . . . (13) a person acts 'recklessly' with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregarding it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation . . . ."

sidered where the record adequately demonstrates that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial. The claim of the defendant in this case that her first amendment freedoms were violated by the instructions given to the jury would fall within that rule. *Terminiello* v. *Chicago*, 337 U.S. 1, 5.

In *Chaplinsky* v. *New Hampshire*, supra, a statute (p. 569) which forbade addressing "any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place" was upheld as not infringing upon freedom of speech because the state court had construed (p. 573) the broad language of the statute as forbidding no words except those having "a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." "'[F]ighting' words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace"—have never been deemed to fall within the protection of the first amendment. Id., 572; *Cantwell* v. *Connecticut*, 310 U.S. 296, 309. There can be no question but that the remarks attributed to the defendant in this case could reasonably have been found to constitute "fighting words." Nevertheless, the defendant may assert her claim of overbreadth if the statute as explained in the charge would have permitted her conviction without a finding by the jury that her utterance had a substantial tendency to provoke violence on the part of the complainant. *Terminiello* v. *Chicago*, supra, 5. "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may

not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute." *Coates* v. *Cincinnati*, 402 U.S. 611, 619–20.

Despite the evident care with which the charge was framed, we cannot say that it limited the broad language of the statute to prohibit only those expressions having a substantial tendency to provoke violent retaliation or other wrongful conduct. At least where speech in a public place is involved, an instruction that a conviction may be had for conduct which is "so grossly offensive . . . as to amount to a nuisance" or which "outrages the sense of public decency" or which causes "inconvenience, annoyance, or alarm" exceeds the narrow scope of

permissible restrictions on freedom of speech. *Plummer* v. *Columbus*, 414 U.S. 2 ("menacing, insulting, slanderous, or profane language"); *Gooding* v. *Wilson*, 405 U.S. 518, 519 ("opprobrious words or abusive language, tending to cause a breach of the peace"); *Coates* v. *Cincinnati*, supra, 611 ("conduct themselves in a manner annoying to persons passing by"); *Terminiello* v. *Chicago*, supra, 5 ("if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest").

The state argues that the infirmity of the statute as construed by the trial court is cured by the requirement in § 53a-182 (a) (2) of a specific intention "to cause inconvenience, annoyance or alarm." Several of the disorderly conduct statutes deemed to have been overbroad in the absence of a "fighting words" limitation have contained similar provisions necessitating proof of intention as an element of the crime. *Acker* v. *Texas*, 430 U.S. 962; *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571–72, affirming 91 N.H. 310; *Hansen* v. *People*, 548 P.2d 1278 (Colorado). That feature has not evoked any judicial comment suggesting that the "fighting words"

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restriction may be supplanted by such a provision. If the prohibition of conduct which "annoys or interferes with another person" is overbroad because it reaches constitutionally protected speech, that deficiency would not be remedied by requiring a mental element defined in terms of similar latitude as provided by § 53a-182 (a) (2) ("intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof"). In no significant way does the addition of that element alleviate the inhibiting effect upon freedom of expression, which is the essential rationale of the overbreadth doctrine. *Dombrowski* v. *Pfister*, 380 U.S. 479, 486.

We conclude that the failure of the charge to limit the application of § 53a-182 (a) (2) to "fighting words" in accordance with *Chaplinsky* v. *New Hampshire*, supra, deprived the defendant of a fundamental constitutional right.

II

The defendant claims that her conviction for harassment in violation of § 53a-183 (a) (3) also infringed upon her constitutional right to freedom of speech. The statute, which she claims is overbroad without some judicial gloss limiting its application to "fighting words," provides in the portion involved that "[a] person is guilty of harassment when: . . . (3) with intent to harass, annoy or alarm another person, he makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm." The charge provided the jurors with definitions of the words "harass," "annoy" and "alarm" and instructed them that if they found that the defendant had made a telephone call with the intention to harass, annoy, or alarm, and that the telephone call did harass, annoy, or alarm another person, then the defendant

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would be guilty of the offense. No exception was taken with respect to the deficiency in the charge now claimed, but we must, nevertheless, consider the matter to determine whether the record indicates that the defendant has been deprived of a fundamental constitutional right. *State* v. *Evans*, 165 Conn. 61, 70.

As venerated a place as freedom of speech may hold in the constitutional scheme, reasonable regulation of the place and manner of its exercise has been upheld consistently. *Breard* v. *Alexandria*, 341 U.S. 622, 642; *Cox* v. *New Hampshire*, 312 U.S. 569, 574. Where the means of communication involves an intrusion upon privacy, the right to free expression must be balanced against the right to be let alone. *Rowan* v. *Post Office Department*, 397 U.S. 728, 736. A telephone is not a public forum where, in vindication of our liberties, unreceptive listeners need be exposed to the onslaught of repugnant ideas. See *Lehman* v. *Shaker Heights*, 418 U.S. 298, 302–303. The overbreadth principle is not violated by the unrestricted scope of the messages which the statute may ban because it is the manner and means employed to communicate them which is the subject of the prohibition rather than their content. The statute is not flawed because a recital on the telephone of the most sublime prayer with the intention and effect of harassing the listener would fall within its ban as readily as the most scurrilous epithet. The prohibition is against purposeful harassment by means of a device readily susceptible to abuse as a constant trespasser upon our privacy. That words may be the instrument of annoyance does not insulate such wrongful conduct from criminal liability. We conclude that it was not necessary to limit the application of § 53a-183 (a) (3) to "fighting words" as claimed by the defendant.

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III

The only ruling on evidence claimed as error is that the court struck out the testimony of the defendant that she had been acquitted of a criminal charge brought against her previously by the same complainant. The defendant had testified on direct

examination that, as the complainant passed by, she had shouted to the defendant that she had once put the defendant in jail. In cross-examining the defendant, the prosecutor, referring to the remark attributed to the complainant, asked whether there had been any prior proceeding and whether the defendant felt that she had been treated fairly in that proceeding by the complainant and her family. After objections the court allowed a question as to whether the defendant felt that the complaint made in that proceeding by the complainant and her family had been fair. She responded negatively. On redirect examination of the defendant, after she testified that she had been acquitted in the prior proceeding, the court ordered her answer to be stricken and instructed the jury to disregard it.

There is some division of authority upon the question of whether a defendant may prove that he was acquitted of a prior crime about which the state has introduced some evidence. Annot., 86 A.L.R.2d 1132, 1144–46; 29 Am. Jur. 2d, Evidence, § 332. In this state in the trial of an escape charge it was held that such evidence was of "such slight and inconsequential relevance that at best it would serve more to divert attention from important evidence than to elucidate vital issues." *State* v. *Blyden*, 165 Conn. 522, 531. In that case, however, it appears that the defendant had been the first to inquire about the other offenses and not the state. We do not regard that case as rejecting the view that the defendant should be entitled to show that he was acquitted of another crime to which the state has first made reference during the trial in order to

help offset the prejudice which the defendant otherwise would suffer. *People* v. *Griffin*, 66 Cal.2d 459, 466; *State* v. *Leahy*, 243 Iowa 959, 967; *Nolan* v. *State*, 213 Md. 298, 310; *State* v. *Smith*, 271 Or. 294, 299; see *State* v. *Segar*, 96 Conn. 428, 442; 4 Wigmore, Evidence (3d Ed.) § 1117 (4).

In the present case it was the defendant who first referred to the other offense in testifying that the complainant had said she once put her in jail. The inquiry of the prosecutor on cross-examination about the prior proceeding was restricted by the court to ascertaining whether the defendant thought that the complaint made in that proceeding was fair. There was no mention of the nature of the offense or the facts relating to it. The mention of "jail" came only from the defendant in her direct testimony and also from one of her witnesses who testified similarly about the remark of the complainant. In our view, the limited reference to the other offense which was made by the state did not materially add to whatever prejudice might possibly have resulted from the previous testimony. It was unnecessary, therefore, to allow the defendant to prove her acquittal as redress for the state's exploitation of an extraneous issue, and the ruling of the trial court, which avoided any further reference to the matter, was a proper exercise of discretion.

There was no error in the conviction of the defendant for harassment in violation of § 53a-183 (a) (3) under the first count of the information; there was error in the conviction of the defendant for disorderly conduct in violation of § 53a-182 (a) (2) under the second count of the information, the judgment is set aside, and that count of the information is remanded for a new trial.

In this opinion PARSKEY and A. ARMENTANO, JJ., concurred.

STATE ETHICS COMMISSION

State Ethics Commission advisory opinions are published herein pursuant to section 3 (5) of Public Act 77-605 and/or section 3 (3) of Public Act 77-600 and are printed exactly as submitted to the Commission on Official Legal Publications.

Branch or Subdivision of State Government

Advisory opinion number 78-12, dated August 4, 1978, by order of the State Ethics Commission, Rev. Thomas J. Lynch, chairman:

A person working for the Capitol Region Council of Governments has asked the State Ethics Commission whether she is subject to the provisions of Public Act Number 77-605. The person's duties include working with State administrative agencies, activity which could meet the definition of "lobbying" in section 1(k) of that Act. The pro rata value of her compensation for this portion of her assigned tasks could exceed the financial threshold for lobbyists established by section 1(*l*) of the Act. Therefore, she may be a lobbyist unless she is exempted by one of the statutory exclusions from that term.

Her relationship with the Capitol Region Council of Governments is clearly that of an employee. As an employee of the Council, she would be excluded from the definition of "lobbyist," despite any lobbying, if the Council is "a branch of state government or a subdivision thereof" and she is acting within the scope of her employment when she lobbies. Section 1(*l*)(1), Public Act Number 77-605.

The Capitol Region Council of Governments has been established under sections 4-124i through 4-124p, Connecticut General Statutes. As provided by section 4-124l, it is the regional planning agency, Chapter 127, for the Capitol planning region and has the rights, duties, and

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MARY GORMLEY,
Petitioner,

V.

DIRECTOR, CONNECTICUT STATE DEPARTMENT PROBATION, ET AL,
Respondents

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT E. BEACH, JR.
Assistant State's Attorney
Office of the Chief State's Attorney
P.O. Box 5000
Wallingford, CT 06492
Attorney for the Respondents

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STATEMENT OF THE CASE

The appellant was convicted by a jury of two counts: one in violation of Section 53a-182(a)(2) of the Connecticut General Statutes and the other in violation of Section 53a-183(a)(3). On appeal, the Appellate Session of the Superior Court reversed the conviction on the first count (disorderly conduct) but affirmed the conviction on the second count (harassment). The conviction on the first count was overturned on the reasoning that as applied to speech and in the absence of a narrowing instruction to the jury, a section of the disorderly conduct statute was overbroad. State v. Anonymous, (1978-4), 34 Conn. Sup. 689, 389 A.2d 1270, 1272-73 (Conn.App. 1978). Distinguishing the use of the telephone, however, that court upheld the harassment conviction. State v. Anonymous, supra at 389 A.2d 1273-74. The Connecticut Supreme Court denied certification. State v. Gormley, 174 Conn. 803, 382 A.2d 1332 (1978).

Having exhausted state remedies, the petitioner sought federal collateral relief in the United States District Court for the District of Connecticut. The District Court upheld the constitutionality of the statute. (See Document C appended to the petition to this Court). The United States Court of Appeals for the Second Circuit affirmed the District Court. (See Document A appended to the petitioner).

The evidence underlying the convictions was stated in the opinion of the Appellate Session and may be summarized as follows. On the day in question the complainant and her friend were driving to work when they passed the defendant. When the complainant turned into the parking lot of the restaurant where she worked, the defendant drove up closely behind her. When the complainant got out of her car, the defendant shouted that she was a "tramp", that her mother was a whore and had gone to bed with the defendant's husband,

and that the defendant was going to "get" the complainant. The complainant and her friend walked into the restaurant. On these facts, the defendant was convicted of disorderly conduct.

Later, on the same evening, the defendant telephoned the complainant at the restaurant where the complainant worked; over the telephone, the appellant repeated "substantially the same insults." State v. Anonymous, supra, 1271. This event was the basis for the harassment charge.

In charging the jury, the court read the pertinent part of Section 53a-183 (3) of the Connecticut General Statutes: "A person is guilty of harassment when with intent to harass, annoy or alarm another person, he (or she) makes a telephone call, whether or not a conversation ensues, in a manner likely to cause annoyance or alarm.

"So the first element in this particular offense is that there must be an intent and it must be proven by the State beyond a reasonable doubt... [the court went on to define specific intent.]" [App. 2d Cir. 17].

> ...
> The next phraseology in the statute is that: "A person is guilty when with intent to harass, annoy, or alarm." The term harass has been defined in Webster's Dictionary to mean "to trouble, worry, or torment another." The word annoyance is a noun which has been defined as "to irritate, or to vex; to bother, as by repeated actions." And to alarm has been defined as "to make suddenly afraid of or anxious; frightening."
>
> So the test again is what people of common intelligence and common sense would understand would be a telephone call made in a manner likely to cause or have a direct tendency to cause annoyance or alarm. So if you find in this case that the defendant made a telephone call with that intention in mind to harass, to annoy, and in fact that that telephone call, in the conversation, harassed and annoyed another person, then, under those circumstances, you would find the defendant guilty of that offense... (App. 18).

The Appellate Session found no critical infirmity in that portion of the charge. State v. Anonymous, supra, 1273.

ARGUMENT

The petitioner argues that this Court should grant certiorari because the decision of the Second Circuit is contrary to prior decisions of this court and to those of several other state courts. While it may be true that some state courts have overturned their diverse statutes,[1] it is submitted that there is no conflict between the decision below and those of this Court and other Circuits.

The petitioner argues essentially that Section 53a-183(a)(3), which prohibits certain use of the telephone, is unconstitutionally overbroad in that it could be used to prohibit constitutionally protected speech. The respondent disagrees. Though conversation may be relevant, it is not speech itself which is punished, but rather the making of a harassing phone call with the requisite intent. "[W]hen 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968).

The context of the utterance may be balanced against the First Amendment

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[1] Decisions from state jurisdictions have varied, undoubtedly because of differences in the language of the various statutes as well as jurisprudential concerns. Compare, e.g., State v. Dronso, 279 N.W. 2d 710 (1979)("with intent to annoy another, makes a telephone call ...") and State v. Blair, 601 P.2d 766 (Or.1979), with State v. Brown, 266 S.E.2d 64 (S.C.1980); Kinney v. State, 404 N.E.2d 49 (Ind. App. 1980); State v. Elder, 382 So.2d 687 (Fla.1980); Constantino v. State, 255 S.E.2d 710 (Ga.1979); People v. Weeks, 591 P.2d 91 (Colo.1979); Lusch v. State, 387 A.2d 306 (Md.App. 1978).

utterances sought to be protected, For example, in Greer v. Spock, 424 U.S. 828 (1976), a regulation forbidding political speeches at a military base was upheld; in Adderley v. Florida, 385 U.S. 39 (1966), a trespass conviction for picketing at a jail was upheld; in Grayned v. City of Rockford, 408 U.S. 104 (1972), it was held permissible to regulate noise in the vicinity of schools. Thus, even if certain conduct may include a speech element, the mere possibility that communication may be involved does not necessarily outweigh a legitimate competing consideration.

Here, of course, the major competing consideration is privacy. In several closely analogous cases, this Court has recognized such an interest. In Rowan v. United States Post Office Department, 397 U.S. 728(1970), a procedure whereby people could avoid the delivery of "junk mail" was upheld: a rationale for the decision (p.736) was the right to be left alone. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), an ordinance forbidding political advertising on a busline was upheld, at least partly because of the captive nature of the potential audience.

More recently, this Court decided F.C.C. v. Pacifica Foundation, 438 U.S 726 (1978). A radio station broadcast material which was offensive and indecent, though not obscene, and the F.C.C. indicated that it may consider such broadcasts unfavorably in its licensing process. The constitutional issue was whether the First Amendment denies government the power to restrict public broadcast of indecent language. In holding that it does not, the Court noted that no language was entitled to absolute constitutional protection and that broadcasting was different from other media because of its pervasive penetration into the home.

> Outside the home, the balance between the offensive speaker and the unwilling audience requires the offended listener to turn away. See Erzoznik v. Jacksonville, 422 U.S. 205, 95 S.Ct.2268. 45 L.Ed.2d 125. As we noted in Cohen v. California:

> "While this court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue...we have at the same time consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.'" 403 U.S., at 21, 91 S.Ct., at 1786. The problem of harassing phone calls is hardly hypothetical. Congress has recently found it necessary to prohibit debt collectors from "plac[ing] telephone calls without meaningful disclosure of the caller's identity; "from engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called member; "and from" us[ing] obscene or profane language or language the natural consequence of which is to abuse the hearer or reader." Consumer Credit Protection Act, Amendments, Pub.L. 95-109, 91 Stat. 877. F.C.C. v. Pacifica Foundation, supra, 749.

The Second Circuit relied on United States v. Lampley, 573 F.2d 783 (3d Cir. 1978), which upheld a federal telephone abuse statute which parallels quite closely the Connecticut provision.

> The appellant has not claimed, nor could he successfully do so, that it is beyond the power of the Congress to impose criminal sanctions on the placement of interstate telephone calls to harass, abuse or annoy. Not all speech enjoys the protection of the first amendment...and in enacting Section 223, the Congress had a compelling interest in the protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable purposes...[T]he nature of the conversation can have no bearing on the constitutionality of the section since its narrow intent requirement precludes the proscription of mere communication. United States v. Lampley, supra, 787.

The court went on to note that the statute's specific intent requirement negated a claim that the statute was unconstitutionally vague.

The petitioner's overbreadth argument, of course, is premised upon the possible application of the criminal statute to constitutionally protected speech. It is not argued, as it was below, that the petitioner actually

was prosecuted for protected speech. While the respondent recognizes that in the First Amendment context a petitioner may at times assert vicariously the rights of others; see, e.g., Lewis v. City of New Orleans, 415 U.S. 130, 133-34 (1974); the overbreadth doctrine does not allow statutes to be challenged facially on a chimerical claim that a statute could be unconstitutionally applied in a hypothetical situation:

> [W]here conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.
> Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

It is urged that the opinion of the Second Circuit is fully in accord with decisions of this Court, in that the statute regulates conduct and the possibility of a chilling effect is remote. The decision is consistent with United States v. Lampley, supra.

Various state court decisions depend to a great degree on the specfic language of a given statute. While the various decisions are diverse, the great majority seem to be consistent with the decision below. Illinois provides an illustrative example. In People v. Klick, 362 N.E.2d 269 (1977) the Illinois Supreme Court invalidated a statute which prohibited making a telephone call "with intent to annoy another." Two years later, in People v. Parkins, 396 N.E.2d 22 (1979), the Illinois Supreme Court upheld a substituted statute which prohibited making a telephone call "with intent to abuse, threaten or harass any person..." This court dismissed a petition for certiorari for lack of a substantial federal question." _____ U.S. _____, 27 Crim.L.Rep. 4055 (April 21, 1980). It is suggested that the possibility of abuse of the Connecticut statute is so remote that certiorari should be denied.

THE RESPONDENTS

By Robert E. Beach Jr.
ROBERT E. BEACH, JR.
Assistant State's Attorney
Office of the Chief State's Attorney
P.O. Box 5000
Wallingford, CT 06492

PROOF OF SERVICE

This is to certify that on October 20, 1980, a copy of the foregoing was mailed to Joseph Rubin, Esquire, 487 Main Street, Suite 2, Hartford, CT 06103

Robert E. Beach Jr.
ROBERT E. BEACH, JR.
Assistant State's Attorney